

No. 15104

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ORIENTAL FOODS, INC., a corporation,

Appellant,

vs.

CHUN KING SALES, INC. and JENO F. PAULUCCI,

Appellees.

CHUN KING SALES, INC. and JENO F. PAULUCCI,

Appellants,

vs.

ORIENTAL FOODS, INC., a corporation,

Appellee.

REPLY BRIEF OF PLAINTIFFS-APPELLEES- APPELLANTS.

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Chun King submits this reply brief to clarify the issues pertaining to the claim of unfair competition. The answering brief of Oriental points out that Oriental was first engaged in the Chinese-American food business and had adopted labels and color coded its packing cartons before Chun King's entry into the business. Neither the brief nor the record suggests any reason why the prior labels and cartons of Oriental were abandoned. Neither the brief nor the record suggests any reason why, out of the substantially unlimited color combinations and arrangements available, Oriental adopted new labels and cartons so closely resem-

bling Chun King's. A mere comparison of, for example, Exhibits 3, 9 and 10 with their counterparts 3A, 9A and 10A, and their cartons 49, 50 and 51 with cartons 34, 45 and 46, illustrates the attempt of Oriental to simulate Chun King. Such similarity of color, style and arrangement is hardly coincidence, but shows a deliberate copying to promote confusion in the trade and facilitate palming off. It was admitted that Oriental was familiar with Chun King's labels a year and a half prior to abandoning its old labels and adopting the new accused labels [R. 266, 267].

Nowhere does Oriental offer any explanation for its departure from its prior packing and labeling practice, or how its newly adopted labels and cartons happened to embody the same color scheme, style and arrangement previously adopted by Chun King. The inescapable conclusion is that such labels and cartons were copied to promote confusion in the trade.

The Trial Court recognized this, although unaware of the consequences, in making Finding of Fact 30 [R. 88], "A casual buyer who did not buy by the brand name might pick up one can for the other."

The only reason that the Trial Court held against plaintiff was its belief that the law did not protect such purchasers: See Finding of Fact 26 [R. 87]:

"No appreciable number of prospective purchasers of these goods *of the class that the law protects* are likely to be confused as to the source thereof." (Emphasis added.)

Findings of Fact 27, 28, 29 and 31 all include within their scope the two trademarks "Chun King" and "Jan-U-Wine." The error of the Trial Court lies in its approach to the case as one of trademark infringement. This is an action for unfair competition. There is no claim that the trademarks "Chun King" and "Jan-U-Wine" are confusingly similar.

Oriental, in its answering brief, recognizes the real basis for the complaint. At page 9 of its brief it is stated:

"The courts are quick to protect an established business against the inroads of a newcomer who copies the dress of the goods of the established business. * * *"

The Trial Court, however, misinterpreted the nature of the claim, stating in its opinion:

"So doing, we disregard what the Restatement calls 'the indiscriminating prospective purchaser,' *and are guided by the effect upon the person who looks for brand names.*" (Emphasis added.)

The Court, therefore, made an error of law as to the nature of the purchaser class the law of unfair competition protects. See *Chesebrough Mfg. Co. v. Old Gold Chemical Co., Inc.* (6 Cir., 1934), 70 F. 2d 383, and the remaining cases cited in Chun King's opening brief.

Thus, the record develops a situation where Chun King commenced the business of selling Chinese-American foods and developed distinctive labels and cartons for its products. Oriental, which had long been in the same business, upon seeing the great success of Chun King, abandons its

long-used labels and cartons and adopts new labels and cartons closely resembling those of its new, vigorous competitor for the purpose of promoting confusion in the minds of the purchasing public and to trade upon the goodwill of Chun King. A clear case of unfair competition has been established, requiring reversal of the portion of the Trial Court's judgment dismissing the unfair competition claim.

Respectfully submitted,

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